

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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**JAN 23 2009**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Appellee,	)	2 CA-CR 2008-0117
	)	DEPARTMENT B
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
FRANCISCO RENE BENITEZ,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20070906

Honorable Stephen C. Villarreal, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General  
By Kent E. Cattani and Amy M. Thorson

Tucson  
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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Francisco Benitez was convicted of two counts of aggravated driving under the influence of an intoxicant (DUI) and two counts of aggravated driving with a blood alcohol concentration (BAC) of .08 or more. The trial court sentenced him to enhanced, concurrent, presumptive prison terms of ten years each. On appeal, Benitez argues the court abused its discretion in denying his motion for a mistrial after the state elicited testimony estimating his BAC based on the results of a field sobriety test. We affirm for the reasons set forth below.

### **Factual and Procedural Background**

¶2 “We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury’s verdicts.” *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). On January 4, 2007, a police officer observed Benitez driving fifteen miles per hour below the speed limit and then accelerating, decelerating, and accelerating again. The officer stopped the vehicle Benitez was driving because its registration had expired. As the officer stood near Benitez’s vehicle, he noted the odor of alcohol emanating from the passenger compartment, and he smelled the same odor coming from Benitez’s mouth during the exchange that followed.

¶3 When asked if he had been drinking that evening, Benitez replied that he had consumed two beers after work. The officer asked Benitez, who agreed, to perform a field sobriety test—the horizontal gaze nystagmus (HGN) test. The officer then conducted an HGN test and observed six of six cues of impairment. Benitez refused to participate in

further field sobriety tests and was arrested on suspicion of DUI. Police officers drew a blood sample from Benitez approximately forty minutes after he was stopped.

¶4 At a trial held in Benitez's absence,<sup>1</sup> the state asked the arresting officer if he had taken Benitez into custody because he had declined to take further field tests, to which the officer replied in the negative. When asked why he had arrested Benitez, the officer explained: "Based on my observations from the very start when I observed the vehicle[,] through the [HGN] test, I believed [Benitez] to be impaired to the slightest degree or over an .08." Benitez objected to this testimony on the grounds it "call[ed] for a legal conclusion" and was "not . . . legally permitted," and he moved for a mistrial. The trial court denied the motion for mistrial but admonished the jury as follows:

I'm going to grant [defense counsel's] motion to strike the officer's last statement about his opinion. It's hereby stricken from the record.

Ladies and gentlemen, the question of whether the defendant was impaired to the slightest degree is an issue for you to decide and not for someone else to decide, so I've stricken that from the record. You're to disregard [the officer's] last statement here in court just a moment ago.

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<sup>1</sup>Benitez's counsel moved for a continuance on the first day of trial, assuming "health issues" had prevented Benitez from calling in or attending. The trial court denied the motion, however, stating insufficient information had been presented that a medical condition caused Benitez to be absent. Although the court indicated to counsel later that day it would accept documentary proof of Benitez's condition, apparently none was furnished, and Benitez does not challenge the court's denial of his motion to continue.

¶5 Later in the trial, the state’s expert witness testified the blood test showed Benitez had a BAC of .093. The jury found Benitez guilty of four counts of aggravated driving under the influence of alcohol,<sup>2</sup> and this appeal followed.

### Discussion

¶6 Benitez now argues “the trial court abused its discretion when it failed to grant a mistrial after the state elicited testimony about [his] BAC based on a field conducted HGN test.” We disagree, as we do not find the officer’s testimony improper on this ground.<sup>3</sup>

¶7 HGN test results are “not admissible in any criminal case as direct independent evidence to quantify blood alcohol content.” *State v. Superior Court*, 149 Ariz. 269, 280, 718 P.2d 171, 182 (1986) (emphases omitted). But when the state performs a chemical analysis such as a blood test, “the parties may introduce HGN test results in the form of estimates of BAC over .10[], to challenge or corroborate that chemical analysis.” *State ex rel. Hamilton v. City Court of Mesa*, 165 Ariz. 514, 517 n.2, 799 P.2d 855, 858 n.2 (1990); *see also State v. Campoy*, 214 Ariz. 132, ¶ 9, 149 P.3d 756, 759 (App. 2006) (noting HGN

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<sup>2</sup>The state presented evidence that Benitez’s license was suspended when he was stopped and that he had been convicted of two DUI offenses committed within the previous eighty-four months, making his present offenses felonies under former A.R.S. § 28-1383(A)(1) and (2). *See* 2006 Ariz. Sess. Laws, ch. 395, § 5.

<sup>3</sup>As our factual summary makes clear, Benitez sought a mistrial on different grounds than he now urges on appeal. Because the state has not argued that Benitez has thereby forfeited his claim, and because we reject the appellate claim on its merits, we need not address whether the trial court fundamentally erred in failing to grant a mistrial, the appropriate standard of review under such circumstances. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

test results “cannot be used to quantify or estimate BAC *in the absence of a chemical test*”) (emphasis added).

¶8 Here, the state conducted a blood test and, based on the results of its chemical analysis, introduced evidence that Benitez’s BAC was .093 within one hour of driving. The state was therefore permitted to present evidence corroborating this figure in the form of the arresting officer’s testimony that Benitez’s performance on the HGN test suggested his BAC was above .08.<sup>4</sup>

¶9 Even if we were to assume, however, that the officer’s testimony was improper on the ground Benitez originally asserted—that it constituted improper opinion evidence on the ultimate issue—we would still not find the trial court had abused its discretion in denying Benitez’s motion for a mistrial. *See State v. Marshall*, 197 Ariz. 496, ¶ 10, 4 P.3d 1039, 1043 (App. 2000) (ruling on motion for mistrial reviewed for abuse of discretion). “In deciding whether to grant a mistrial based on a witness’s testimony, the trial court considers (1) whether the testimony called to the jury’s attention matters that it would not have been justified in considering in reaching the verdict, and (2) the probability that the testimony influenced the jury.” *State v. Gulbrandson*, 184 Ariz. 46, 62, 906 P.2d 579, 595 (1995). We defer to the trial court’s decision because it is in the best position to assess whether the

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<sup>4</sup>Although *Hamilton* contemplated BAC estimates above .10, *see* 165 Ariz. at 517 n.2, 799 P.2d at 858 n.2, the statutory threshold was later reduced to .08, *see* 2001 Ariz. Sess. Laws, ch. 95, § 5, and the officer at Benitez’s trial testified that HGN test performance indicates the probability a driver is above the .08 limit.

testimony will likely affect the trial’s outcome. *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003).

¶10 Here, the trial court could have reasonably concluded that the officer’s single remark did not influence the verdicts. As noted above, the court informed the jury repeatedly that it was striking the challenged testimony from the record and instructed jurors “to disregard [the officer’s] last statement.” The jury had previously been instructed not to consider stricken evidence, and the court was entitled to presume the jury would follow the court’s instructions. *See id.* ¶ 43 (finding curative instruction overcame any probability jury improperly considered statement).

¶11 Furthermore, the bases for the officer’s belief that Benitez was impaired to the slightest degree—his erratic driving, the odor of alcohol on his breath, and his performance on the HGN test—were all admissible evidence from which the jury was entitled, and instructed, to draw its own conclusions. Moreover, the state presented admissible, scientific, blood test results establishing Benitez’s BAC had been .093, providing arguably stronger and more persuasive evidence of Benitez’s impairment than the officer’s mere opinion. Accordingly, we conclude the trial court did not abuse its discretion by refusing to grant a mistrial.

### **Disposition**

¶12 We affirm Benitez’s convictions and sentences.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge